YONG YEU SIN

v.

LIEW NYAT KUI & ORS

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD J
[SUIT NO: MR 5-1995]
10 JANUARY 2003

LAND LAW: *Transfer - Indefeasibility of title - Fraud - Transfer of land to adopted children - Allegation of fraud - Allegation of undue influence and duress - Whether proved - Subsequent sale of land to third party - Whether third party acquired good title - Sarawak Land Code, s. 132(1) - Contracts Act 1950, ss. 14, 16*

LAND LAW: *Indefeasibility of title and interests - Bona fide purchaser for value without notice - Tranfer of land duly effected - Whether acquiring indefeasibility upon registration of transfer - Sarawak Land Code, s. 132(1)*

Lee Mee, since deceased, in this case was the owner of a piece of land in Miri, Sarawak ('the said land'), while the plaintiff and the first and second defendants were her adopted children. By two memoranda of transfer dated 10 May 1983 ('MT1 & MT2'), and executed before a solicitor ('Messrs. Mutang & Sam'), the deceased transferred the said land to the first and second defendants for RM25,000 each. Subsequently, by a memorandum of transfer dated 19 March 1990 ('MT3'), the first and second defendants sold the said land to the third defendant for RM60,000. The plaintiff alleged that MT1 and MT2 were unlawfully executed, as the deceased, at the material time, was suffering from mental incapacity, and that the transaction, in any case, was executed by way of fraud, undue influence, duress or coercion on the part of the first and second defendants, and in the circumstances, applied for an order that the said land be reverted to the deceased or her estate. The plaintiff however did not adduce much evidence to support his allegations, apart from asserting that he had informed the Superintendant of Land Survey, Miri, and apparently Messrs. Mutang & Sam too, that the deceased was of unsound mind. The facts showed, however, that, Messrs. Mutang & Sam, prior to executing MT1 and MT2, had sought the opinion of a psychiatrist, one Dr. Choudhury', regarding the deceased's mental state, and had only attested to MT1 and MT2 upon confirmation that the deceased had not been suffering from any mental

disorder. This being the case, before the learned judge, questions arose as to whether the validity of MT1 and MT2 could successfully be challenged by the plaintiff, and secondly, whether the third defendant, having paid the full purchase price for the said land, had obtained a good title thereto.

Held:

[1] The burden of proving that the deceased was at the material time suffering from mental incapacity lies upon the plaintiff. In the present case, apart from Dr. Choudhury's letter certifying that the deceased was of sound mind, there was no other medical evidence adduced on the mental condition of the deceased. That being so, the best evidence available as to the deceased's mental condition before or at the material time was Dr. Choudhury's letter. (pp 275 f, 277 h & 278 a)

[1a] There were insufficient evidence for the court to make a finding that the deceased was at the material time of unsound mind. In fact Dr. Choudhury's letter was consistent with a finding that the deceased was of sound mind at the time of execution of the memoranda. Certainly, a person who has been certified fit to make a satisfactory will shall likewise have the mental capacity to deal with her property including the transfer of same. (p 278 b-c)

[2] The plaintiff has failed to prove beyond reasonable doubt that the first and second defendants have colluded to defraud the deceased of her land. There could not be a case for fraudulent misrepresentation, as both MT 1 and MT 2 were executed before a solicitor who had acted for both parties and had explained to them the effect of the transfer. As for the consideration, having regard to the financial means of the first and second defendants, it is not improbable that they could have raised the said sum of RM25,000. What more when the consideration, purportedly was paid in the presence of the brother of the deceased. (pp 283 a, 281 b & 282 a-c)

[3] Although they were the adopted daughters of the deceased, the first and second defendants were not in a position to dominate the will of the deceased. In the first place, the plaintiff himself had testified that the deceased could look for herself until her death in 1990. In addition, the said transaction was also made with the service of a solicitor who had explained the nature and effect of the memoranda of transfer to the deceased. The deceased was also sent for

examination by a psychiatrist who certified that she was not suffering from any mental incapacity. It could be concluded, therefore, that despite her old age the deceased was capable of exercising her judgment independently. (p 285 b-c & d)

[4] Since the transfer of the said land to the first and second defendant was not tainted with fraud, it follows that they had good and valid title thereto to be transferred to the third defendant. But even if the transfer of the said land to the first and second defendants was tainted with fraud or was otherwise void for any reason, it is clear from the evidence that the third defendant were *bona fide* purchaser for value without notice. Hence, upon becoming registered as the proprietor thereof, the third defendant had acquired an indefeasibility of title within the meaning of s. 132 of the Sarawak Land Code. (p 286 b-c)

[Action dismissed.]

Case(s) referred to:

Abdul Malik Abdul Majid v. Asnah Hamid & Anor [1985] 2 CLJ 364; [1985] CLJ (Rep) 376 HC ***(dist)***
Assets Co Ltd v. Mere Roihi [1905] AC 176 ***(refd)***
Chu Choon Moi v. Ngan Sew Tin [1986] 1 MLJ 34 ***(refd)***
Creelman & Anor v. Hudson Bay Insurance Co [1920] AC 194 ***(refd)***
Lai Kwee Lan & Anor v. Ng Yew Lay & Anor [1990] 1 MLJ 211 HC ***(refd)***
Lim Kim Hua v. Ho Chui Lan [1996] 2 CLJ 299 HC ***(refd)***
Mohd Isa v. Hj Ibrahim [1968] 1 MLJ 186 ***(refd)***
Ong Ban Chai v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(dist)***
Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 14, 16
Land Code (Sarawak), s. 132(1), 134(1)
National Land Code, s. 340(1), (2)

Other source(s) referred to:

Halsbury's Law of England, 4th edn, vol 30, p 579, paras 1029-1030

For the plaintiff - Tai Choi Yu; M/s Tai Choi Yu & Co
For the 1st & 2nd defendants - SH Lim; M/s SH Lim & Co
For the 3rd defendants - KY Lin; M/s Kadir, Wong, Lin & Co
For the 4th defendant - Abdul Halim Hj Sabil; State AG's Chambers

Reported by WA Sharif

JUDGMENT

Sulaiman Daud J:

This action involves a dispute over a piece of land known as Lot 1027, Miri Concession Land District ("the said land") between the plaintiff and the first, second and third defendants. The said land is for the time being registered in the name of the third defendant, V.S. Wong's Motor Sdn Bhd.

For the purposes of the trial the following documents were tendered and marked upon the agreement of the parties, namely:

(a) Bundle of Pleadings marked as "exh A".

(b) Bundle of Agreed Documents marked as "exh B".

(c) Supplementary Bundle of Agreed Documents marked as "exh B1".

(d) Bundle of Disputed Documents marked as "C".

(e) Statement of Agreed Facts marked as "D".

At the commencement of the proceedings, by consent of the parties concerned the plaintiff withdrew his claim against the fourth defendant upon the undertaking by the fourth defendant that they will execute any order of the court given in respect of the present suit.

Relevant Facts

The essential facts leading to this action as established by relevant evidence can be summarised as follows. The plaintiff and the first and second defendants are ethnic Chinese by descent and were at all material times the adopted children of Lee Mee (f) deceased. The deceased was the original registered proprietor of the said land. The said land was transferred by the deceased to the first and second defendants in equal undivided shares for a sum of RM25,000 each *vide* Memorandum of Transfer Instruments Nos. L. 2853/1983 ("MT1") and L. 2852/1983 ("MT2") respectively both dated 10 May 1983 and registered on 2 August 1983. The first and second defendants subsequently sold their respective shares in the said land to the third defendant for a sum of RM60,000 *vide* Memorandum of Transfer No. L. 1982/1990 dated 19 March 1990 ("MT3").

The evidence shows that about two and half years prior to the first transfer in 1983, the plaintiff by letter dated 23 October 1980 have already informed the Superintendent of Land Survey, Miri that his mother Lee Mee (deceased) was suffering from mental illness, and that any decision made by her in respect of the said land cannot be taken for granted (exh. P2, at p. 2 of "C"). He has also lodged a police report that a person whom he believed to be a lawyer had approached her mother to sign certain document pertaining to the said land (at p. 7 of exh. B). In the report he also said that her mother was suffering from mental incapacity and that she wanted to give the said land to him.

Later in 1990 the plaintiff also published certain advertisements relating to the said land in a Chinese daily newspaper Miri Daily News. The translation of one of such publication made sometimes in March 1990 (exh. P7) read:

> LIEW YONG YET KUI, SHEN CHIEW LAN, LEE SHE FONG all of you are required to come and discuss with me within 1 week in default will be your fault. (See exh. P7A at p. 10 of "C").

This was followed by another advertisement published in April 1990 (exh. P10 of C), the translation of which read:

> BREAKING UP RELATIONSHIP
>
> LIEW YONG YET KUI, SHEN CHIEW LAN, LEE SHE FONG assignment Sale and Purchase Agreement deem invalid and as from to-day there will be no relationship between us.
>
> Any commercial entrepreneurs or towkays involved with document of title to land Lot 1027 please contact me. (see exh P10A at p. 14 of C).

The plaintiff in his pleading asserted that when the said land was transferred to the first and second defendants the said Lee Mee (deceased) was suffering from mental disability or disorder. It was alleged that for the purpose of the said transfer the first and second defendants have fraudulently colluded and conspired between themselves and fraudulenty obtained or procured the deceased's left thumb print on the memorandums of transfer MT1 and MT2. It was further asserted that the said thumb print was also procured by the due influence, duress or coercion of the first and second defendants over the deceased.

With regard to the subsequent transfer of the said land to the third defendant, the plaintiff averred that the said memorandum of transfer MT3 was open to the public, and that a diligent search at the said registry would have revealed the mental incapacity of the said Lee Mee (deceased) as stated

in the doctor's letter attached thereto. The plaintiff contended that by reason thereof the third defendant had full knowledge of the deceased's mental incapacity to execute the last mentioned memorandum of transfer but took the risk and purchased the said land voluntarily.

By this action the plaintiff prayed for the following relief:

(a) an order that the fourth defendant correct or rectify the entry or endorsement in the Miri Land Registry to show that the said Lee Mee (f) deceased or her estate is the registered proprietor of the said land.

(b) and/or alternatively a vesting order that the said land be vested in the plaintiff and/or the said Lee Mee (f), deceased, and/or her estate;

(c) full restitution of the sum of RM500,000 or in kind based on the market value of the said land whichever is higher;

(d) general damages for fraud, conspiracy and collusion and/or undue influence, duress and coercion;

(e) interest from the date of committal of the said tort and/or date of writ herein until full and final payment;

(f) such other reliefs as the court deem just; and

(g) costs.

The first and second defendants in their defence asserted that the transfer of the said land in their favour was made for valuable consideration which has been paid to the deceased during her lifetime, and that at all material time the deceased was of sound mind.

The first and second defendants denied the plaintiff's allegations of any perpetration of fraud over the deceased or the plaintiff or to both. They also denied that at the material time, the deceased was under their control or that they have exerted undue influence, or duress or coercion over the deceased to execute the said memorandum of transfer in their favour.

The defence of the third defendant is straight forward. They denied being a purchaser with notice or a purchaser in perpetration of fraud on the plaintiff or the deceased.

I will first deal with the plaintiff's claim against the first and second defendants.

From the pleading and the established fact of the case, in my view three principle issues arose for determination in respect of the plaintiff's claim against the first and second defendant, that is to say:

(a) first whether the deceased Lee Mee was of unsound mind at the material time when she affixed her thumbprint on the memorandums of transfer MT1 and MT2 dated 10 May 1983;

(b) second whether the first and second defendants have conspired and colluded to defraud the deceased of the said land.

(c) third whether there was any undue influence, duress or coercion exerted by the first and second defendants upon the deceased as regards the execution of the relevant memorandum of transfer.

Whether The Deceased Was Of Unsound Mind

With regard to the allegation of unsound mind, the first question to be answered is on whom lies the burden of proving the same. The learned counsel for the first and second defendants drew my attention to a passage in *Halsbury's Law of England*, (4th edn), vol. 30, p. 579 paras. 1029-1030 which state that:

> Every man is presumed sane until the contrary is proved, ... Where a person has been proved or is admitted to have been mentally disordered as to be incapable for purposes of contract or disposition, the law presumes such a condition to continue until it is proved to have ceased.

It appears to me from the above passage that the burden of proving that the deceased was at the material time suffering from mental incapacity lies upon the plaintiff. On this issue it is obvious to me that the plaintiff is relying on the letter of one Dr. M.A.T. Choudhury dated 25 July 1983 (at p. 12 of exh. B), together with the evidence of a medical officer Dr Francis Kong Ing Fei (PW7) and the testimonies of other witnesses.

PW6, an advocate, testified that the two memorandums of transfer MT1 and MT2 were prepared by his firm Messrs Mutang & Sam. According to him his firm wrote the letter dated 7 June 1983 (at p. 10 of exh. B) to Miri Hospital as a result of the allegation made by the plaintiff (PW1) that the deceased is of unsound mind.

The said letter in so far as relevant read:

Our Ref: MT/sim/L7/83

7th June, 1983

The Divisional Medical Officer,
Fourth Division,
Tanjong Lobang Hospital,
Miri.

Dear Sir,

RE: Madam Lee Mee

We are acting for and on behalf of Madam Lee Mee of P.O. Box 122, Miri, Sarawak.

Our instructions are that our client wishes to effect a transfer of her land to her two daughters. Before proceeding to do so, we have to ascertain through medical certification that our client is of sound mind as there is an allegation by her son that she is of unsound mind. Under the law, a transfer by a person of an unsound mind is deemed null and void.

Therefore, we would be most grateful if you could arrange for a doctor to examine and to certify our client as to her mental state of mind as soon as possible as she is growing old as the days go by. Kindly let us know the time convenient so that we could arrange for our client to come and see you. Thanking you for your kind co-operation in this matter.

Yours faithfully,

Sgd.

c.c.: Client.

Pursuant to the letter the deceased was subsequently examined by Dr. Choudhury, a specialist psychiatrist, at the Miri Hospital on 19 July 1983. He stated the mental condition of the deceased in his letter dated 25 July 1983 addressed to the law firm, which read:

Our Ref: 150/SMH/93/2

25th July, 1983

Mutang Tagal & Company
Advocates/Peguambela
No. 20 (1st Floor) High Street
PO Box 1114
MIRI

Sir

MADAM LEE MEE

Madam Lee Mee, 75 years old, was examined by me on 19.7.1983 at Miri General Hospital at the request of her lawyer. She spoke in Chinese and Mr. Tan Nai Ang, a Hospital Assistant, acted as an interpreter.

2. In my opinion she is fit to make a satisfactory will.

"BERKHIDMAT UNTUK NEGARA"

Sgd.
(DR M.A.T. CHOUDHURY)
Specialist Psychiatrist
Sarawak Mental Hospital
Kuching.

("Dr. Choudhury's letter")

PW6 further testified that form the said letter he concluded that the deceased madam Lee Mee is of sound mind.

PW9, Dr Francis Kong Ing Fei, a private medical practitioner, stated that he had examined the deceased on February 1992. He also tendered the medical report of the deceased (exh P16). The report shows that during her first visit to the clinic on 17 May 1980, the deceased was found to have cerebral vascular accident (stroke) with right hemiplegia and essential hypertension. The deceased was brought to PW9's clinic for the second time on 1 June 1989 where a thoraco-lumber spine x-ray was taken on her but no fracture was found.

Other witnesses who gave evidence on the mental conditions of the deceased were PW1, PW5 and PW6. PW1 (the plaintiff) stated that when the deceased first came to Miri she was in good health but at the later stage in 1954 she used to scold people and her condition became more serious in 1963. According to PW1 his father told him that the deceased was sent to Kuching for treatment. His father passed away in 1969. PW3, the deceased's nephew, also told the court that the deceased used to disturb other vegetable sellers at the market where she sold vegetables.

In the present case, apart from Dr. Choudhury's letter, there was no other is medical evidence adduced on the mental condition of the deceased. PW9's medical report on the deceased also did not give any indication on the deceased's mental condition. PW1, PW5 and PW6's testimony is also in

my view insufficient is to assist the court in making such finding. The best evidence available as to the deceased's mental condition before or at the material time is undoubtedly Dr. Choudhury's letter.

The learned counsel for the plaintiff submitted that the said letter only certify that the deceased is fit to make a satisfactory will which is distinct from the mental capacity required in executing a memorandum of transfer. Be that as it may, having considered the said letter and other related evidence I find that there are still insufficient evidence for the court to make a finding that the deceased was at the material time of unsound mind. In fact the said letter is more consistent to a finding that the deceased is of sound mind at the time of the execution of the said memorandum. In my opinion a person who has been certified fit to make a satisfactory will shall likewise has the mental capacity to deal with his property, including the transfer of the same.

Whether The Defendants Have Colluded, Etc. To Defraud The Deceased And The Plaintiff

It is also the plaintiff's contention that the defendants have colluded to defraud the deceased of the said land when they obtain or procure the deceased's left thumb print on the memorandum of transfer MT1 and MT2. The particulars of the alleged fraud on the deceased was pleaded in para. 17.5 of the statement of claim which read:

> 17.5 In the circumstances the 1st and 2nd defendant had perpetrated a fraud on the said LEE MEE (f) (deceased) and on the plaintiff.
>
> **PARTICULARS OF FRAUD ON LEE MEE (F) (DECEASED) (by the 1st & 2nd Defendants)**
>
> (1) Fraudulently representing and/or interpreting to her that the said Letter sanctioned her to execute the said Memoranda of Transfer when it only sanctioned her to make a will.
>
> (2) Fraudulently representing to her that the documents executed was a will knowing that the said documents were Memoranda of Transfer.
>
> (3) Fraudulently representing to her that the execution of a will has the same effects and/or consequences as the Memoranda of Transfer knowing that they were not the same.
>
> (4) Fraudulently acting in a manner so as to permanently deprive and/or to cheat her of the said land.

(5) Fraudulently stating the consideration of RM25,000.00 on each of the said Memoranda of Transfer knowing that no such money was paid to her.

PARTICULARS OF FRAUD ON THE PLAINTIFF (by the 1st & 2nd Defendants)

(1) Concealing the said Letter and the said Memoranda of Transfer of the said Land from him.

(2) Fraudulently depriving him permanently his hereditary right to the said Land.

The law relating to fraud and the effect thereof in respect of land dealing is well settled. Subsection (1) of s. 132 of the Land Code provides for indefeasibility of title of a registered proprietor of any estate in land. Except that such title may be defeasible on the ground of fraud. The effect of fraud is provided in sub-s. (1) of s. 134 which read:

(1) Any issue document of title or entry or alteration in the Registrar procured or made by fraud shall be void as against the person defrauded, or who may be defrauded thereby, and no person is who is a party or privy to the fraud, or who claims solely as a volunteer under such person, shall take any benefit therefrom.

Although the terms "fraud" is not defined in the Land Code but its meaning had to a great extent been established by judicial interpretation. In *Mohd Isa v. Haji Ibrahim* [1968] 1 MLJ 186, the Federal Court cited with approval the following passage in *Assets Co Ltd. v. Mere Roihi* [1905] AC 176. In the later case, a registered title was challenge on the ground, *inter alia*, that it was obtained by fraud. In delivering the decision of the Privy Council, Lord Lindley said, at p. 210:

... By fraud in these Acts (Torrens Acts) is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of better term, to denote transactions having consequences in equity similar to those which flow from fraud ... . Fraud by a person from whom he claims does not effect him unless knowledge of it is brought home to him or his agent.

Another case in point is the Federal Court case of *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors* [1983] 1 CLJ 183; ([1983] CLJ (Rep) 387) where Abdul Hamid FJ (as he then was) said at p. 185 (at pp 390-391):

> The law is therefore settled that while subsection (i) of section 340 makes it abundantly clear that a title or interest of a registered proprietor which include a chargee shall be indefeasible, such title or interest, however, by reason of subsection (2), shall not be indefeasible in case of actual fraud involving, to borrow the words used in *Assets Company Ltd v. Roihi* quoted: 'dishonesty of some sort, not what is called constructive or equitable fraud'.

The observation made on the interpretation of ss. 340(1) and (2) of the National Land Code in the aforesaid cases is in my view also applicable to the interpretation of ss. 132(1) and 134 of the Land Code. The standard of proof of fraud even in civil cases in Malaysia is proof beyond reasonable doubt. In this respect Syed Agil Barakbah SCJ in *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ 34 said, at p. 38:

> We agreed that fraud whether made in a civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan v. Official Assignee, Rangoon AIR* [1941] PC 93, *Saminathan v. Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case.

Turning now to the allegation of fraud. From the pleading it appears to me that the allegation of fraud against the first and second defendants are based on two factors, firstly on the alleged fraudulent misrepresentation as to the nature of documents executed, and secondly on the failure of consideration.

With regard to the particulars of fraud in (1) above, it is my finding that there is no evidence led by the plaintiff to show that the first and second defendants have defrauded the deceased by representing to the later that Dr. Choudhury's letter sanctioned her to execute the memorandums of transfer MT1 and MT2. It is to be appreciated that the said letter is merely a report by the psychiatrist certifying the mental condition of the deceased. The opinion of the said psychiatrist is necessary for her solicitor to know whether she is mentally fit to execute the memorandum of transfer MT1 and MT2 for the transfer of the said land. PW6, the deceased's solicitor, also testified that based on the said letter he concluded that Madam Lee is of sound mind.

Once the deceased has been certified to be of sound mind, it may not even be necessary for her solicitor to notify the deceased of her mental condition. After all they have received her instruction to effect the transfer of the said land to her two adopted daughters (see p. 10 of exh. B).

It is also my finding that the plaintiff has failed to discharge the burden of poof in support of the particulars of fraud as in (2) and (3) aforesaid. Both the memorandums of transfer MT1 and MT2 were executed before solicitor who acted for both parties. PW7, the solicitor who witnessed the affixing of the deceased's thumbprint on both the related memorandums also testified that he would normally explained the effect of the transfer to the parties concerned. The evidence clearly shows that Messrs Mutang & Sam, the advocates concerned, were acting for all the parties. The instruction given to them was that the deceased, who was their client, wished to effect a transfer of the said land to the first and second defendants. As it has been the intention of the deceased to transfer the said land to them, I see no reason why it is necessary for the first and second defendants to make the alleged fraudulent misrepresentation to the deceased that that the documents executed were a will or that the execution of a will has the same effect as memorandum of transfer.

Next I will consider the allegation on total failure of consideration. The plaintiff's learned counsel based their arguments on this issue on three main grounds. Firstly it is inherently incredible that each of the defendants paid the deceased the said sum of RM25,000 at the solicitor's office since they were staying together. Secondly the evidence of their financial standing shows that both the defendants were incapable of coming up with such sum. Thirdly based on the plaintiff's evidence the deceased only left behind RM100 at the time of her death.

With regard to the first ground, it appears to me from the evidence that at the material time the deceased was not staying with any of the defendants as contended. PW1 himself testified that after his father's death his mother, the deceased, was staying alone but few years before her death she was looked after by the first defendant. The deceased stayed with him from 1990 till her death in 1994. The first defendant admitted that the deceased came to stay with her in 1986, that is few years before her death. From these evidence I conclude that the deceased was not staying with the first or second defendants at the material time in 1983. It is not therefore not improbable that the first and second defendants may have made the said payment at the lawyer's office.

Having considered the financial means of the first and second defendants, I find that it is also not improbable that they could have raised the said sum of RM25,000. In the case of the first defendant she gave evidence that the money was form her saving on the money given to her husband for house expenses. At the material time she had been married for about fifteen years and it is not improbable that she would have saved such amount by then. In the case of the second defendant, she had been working as a vegetable farmer with an income of about RM300. Her husband also had an income. It is also not improbable that she could have saved the said amount after almost twenty three years of marriage.

Further according to the first and second defendants the said consideration was paid in the presence of their uncle Lee Sze Fong. In my view it is also not improbable that the deceased could have discussed the said sale with her natural brother Lee Sze Fong. My finding is further fortified by the fact that the plaintiff has also severed all relationship with the said Lee Sze Fong (see the advertisement exh. P7A and exh. P10A). As the natural brother of the deceased it is not likely that he would be acting in collusion with his two adopted nieces to defraud her sister of her land.

The cases referred to by the learned counsel as illustrations on the commission of fraud are also in my view easily distinguishable with the fact of the present case. In *Ong Ban Chai v. Seah Siang Mong* [1998] 3 CLJ 637 the fact of the case shows that the first appellant, without the knowledge of the respondent, had transferred to himself the respondent's undivided share in three lots of land by the use of an irrevocable power of attorney given to him by the respondent. It was held that the appellant by his overt act had acted fraudulently against the respondent.

In *Abdul Malik bin Abdul Majid v. Asnah bte Hamid & Anor* [1985] 2 CLJ 364; [1985] CLJ (Rep) 376, the plaintiff sold a plot of land to the first defendant for the sum of $10,000. The first defendant then sold the land to one Toh Chooi Nai who in turn sell them to the second defendant. The court set aside the sale between the plaintiff and the first defendant as the said sale was in consequence of threat by him.

In the present case both the solicitors (PW6, PW7) concerned with the preparation and execution of the memorandums of transfer MT1 and MT2 testified that they acted for both the deceased and the first and second defendants in the related transaction. They also did not have any knowledge of the alleged fraud. There was also no evidence adduced to show that the transfer of the said land was the consequence of any overt act of or threat by the defendants as in *Abdul Malik*'s case.

In conclusion it is my finding on the evidence adduced that the plaintiff has failed to prove beyond reasonable doubt that the first and second defendants have colluded to defraud the deceased of her land as particularized in the statement of claim.

With regard to the particulars of fraud against the plaintiff, in my opinion th first and second defendants do not owe the plaintiff any obligation to disclose Dr Choudhury's letter or the memorandum of transfer MT1 and MT2 to him. After all both the deceased and the first and second defendants obtained the service of solicitors to carry out the said transaction. Further it is obvious that the deceased during her life time is free to make any decision on any transaction effecting her land. As such the question of the first and second defendants depriving the plaintiff of his hereditary rights to the said land does not arise at all.

Whether There Was Element Of Duress, Coercion Or Undue Influence

The allegation of undue influence, duress and coercion exerted by the first and second defendants upon the deceased are particularised in para. 17.5 of the statement of claim which read:

> In the absence of the plaintiff and while the said LEE MEE (f) (deceased), being a mental patient and suffering from mental disability and/or disorder, was under the care custody and control of the 1st and 2nd defendants they unduly influenced forced and/or coerced the said LEE MEE (f) (deceased) to execute the said Memoranda of Transfer.

What is undue influence, duress and coercion? Under s. 16 the Contract Act 1950, a contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. "Coercion" is defined under s. 14 of the Act as follows:

> "coercion" is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Likewise "duress" which is not defined under the Act also has the element of threat or compulsion in the doing of any act or thing. In the *Concise Oxford Dictionary*, 9th edn, "duress" is interpreted as compulsion, esp imprisonment, threats, or violence, illegally used to force a person to act against his or her will.

From the pleading aforesaid, it appears to me that the basis of such an allegation is based on two elements, firstly the deceased is of unsound mind, and secondly that the deceased was under the care, control and custody of the first and second defendants. In view of my earlier finding that the deceased is not mentally disordered, the allegation of undue influence, duress and coercion based on this ground must likewise fail on that ground alone.

Next I turn to consider the second element of the allegation. On the question of undue influence, I shall refer to the two cases cited by the learned counsel for the plaintiff. In *Lim Kim Hua v. Ho Chui Lan* [1996] 2 CLJ 299 Steve Shim J (as his lordship then was) stated the law on undue influence which is relevant to the point in issue, as follows:

> Undue influence may arise from the special relationship between parties. In this connection, *Anson's Law of Contract* (26th Ed) at p 245 cited a passage from *Tate v. Williamson* [1866] LR 55 wherein Lord Chelmsford said, *inter alia*:
>
> > Whenever two persons stand in such a relationship that, while it continues, confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage although the transaction would not have been impeached if no such confidential relationship had existed.
>
> It has been held that not every fiduciary relationship raises a presumption of undue influence: see *Re Coomber* [1911] 1 Ch 723 at p 728. It must be one of a limited class which the courts regard as suggesting undue influence and the relations which fall into this category are those between parent (or person in *loco parentis*) and child; see *Bainbrigge v. Browne* [1881] 18 Ch D 188.

The other case referred to is the decision of Singapore High Court in *Lai Kwee Lan & Anor v. Ng Yew Lay & Anor* [1990] 1 MLJ 211 which in my view is not decided on the issue of undue influence. In that case the first defendant acquired certain shares in the deceased's company. The deceased relied on the defendant for assistance in translation and interpretation of documents relating to the company's business. At the time of the alleged transfer the deceased was in hospital suffering from terminal disease. Based on the fact the court was unable to find that the first defendant was in a position of active confidence *vis-a vis* the deceased.

However on the whole evidence, the court was wholly satisfied that the plaintiffs had discharged the burden of proving that there was never a sale of shares to the first defendant.

In the instant case it is not disputed that the first and second defendants are the adopted daughters of the deceased. However on the evidence before me I am unable to find that they are in a position to dominate the will of the deceased. I have earlier made a finding that the deceased was at the material staying alone in her own house. The plaintiff (PW1) himself testified that the deceased was staying alone after her husband passed away in 1969 and that he used to visit her from time to time and gave her money. Although the deceased was treated for stroke in 1980 but the plaintiff himself testified that from 1980 to the time of her death the deceased could look after herself. She only moved to stay with the first defendant in 1986.

In addition the said transaction was also made with the service of solicitor (PW7) who testified that he explained the nature and effect of the memorandums of transfer to the deceased. The deceased was also sent for examination by a psychiatrist who did not certify her to be suffering from any mental incapacity. As such it can be concluded that despite her old age the deceased was capable to exercise her judgment independently. It is also to be borne in mind apart from the first and second defendants the deceased also had a son (the plaintiff) who used to visit her from time to time, and a blood brother who has knowledge of the related transaction. These fact will in my view further strengthened my finding that the first and second defendants were not in a position to dominate the will of the deceased.

With regard to the assertion of duress and coercion, there is not an iota of evidence to show that the transfer of the said land by the deceased to the first and second defendants was in consequence of duress or coercion by them.

In the circumstance it is also my finding that the plaintiff has failed to adduce any evidence to show that the memorandums of transfer MT1 and MT2 were executed in consequence of undue influence, duress or coercion.

The Claim Against The Third Defendant

It is the plaintiff's pleaded case that the third defendant was not a *bona fide* purchaser for value but was a purchaser with notice or a purchaser in perpetration of fraud on the plaintiff and the deceased (see para. 20.5 of the statement of claim). The defendant alleged that the third defendant had

full knowledge of the deceased's mental incapacity from Dr. Choudhury's letter that was attached to the memorandum of transfer MT1 MT2 as these documents were open to search by the public. Notwithstanding that it was further asserted that the third defendant took the risk and purchased the said land voluntarily.

In view of my earlier finding that the transfer of the said land by the deceased to the first and second defendants was not tainted by fraud, it will necessarily follow that they have good and valid title thereto to be transferred to the third defendant. Even if the transfer of the said land to the first and second defendants is tainted with fraud or is otherwise void for any other reason, it is clear from the evidence that the third defendant are *bona fide* purchaser for value without notice. Upon becoming registered as the proprietor thereof, the third defendant acquired an indefeasiblity of title within the meaning of s. 132(1) of the Land Code notwithstanding whatsoever flaws there may have been in the title of their vendor.

In the present case, I am wholly satisfied that there is not an iota of evidence that the third defendant was a party to the fraud, if at all true. The argument that the third defendant would have known of the mental incapacity of the deceased if they have carried out diligent search at the land registry is also fallacious and without merit. It is not disputed that the system of land tenure in Sarawak is based on the Torren System of land registration. One of the cardinal objectives of such system is to facilitate the proof of title to estates in land. The mere presence of the document of title in the Register Book should prove such title to all the world and any purchaser can rely absolutely on the title appearing therein.

I agree with the learned counsel for the third defendant that under the Torren System there is no requirement for the purchaser to look at antecedents or to ascertain the validity of the title of the person for the time being registered in the Register Book. On this point Lord Buckmuster in *Creelman and Another v. Hudson Bay Insurance Company* [1920] AC 194 observed, at 197, that '... to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificates which is the evidence of his title, would be to defeat the very purpose and object of the status of registration'.

I am also satisfied from the evidence that the third defendant had discharged the burden of proof that they are *bona fid*e purchaser for value. Both the first and second defendants admitted executing the memorandum of transfer MT3 and have no complaint on the transaction. They also admitted receiving the full purchase price from the third defendant.

Further during the trial, it is to be recalled that the plaintiff also tendered the advertisement exh. P7 and exh. P10, reproduced earlier, to support the allegation that the third defendant have notice of the fraud. On this point the learned counsel for the plaintiff submitted that the managing director of the third defendant Mr. V.S. Wong (deceased), being a Chinese, must have seen or was aware of the said advertisements. By reason thereof it is contended that the third defendant should have notice of the fraud perpetrated by the first and second defendants if he had taken the trouble to make further inquiry on the advertisements.

With respect it appears to me such contention is merely based on conjecture and assumption and not supported by any evidence. DW3, V.S. Wong's wife and secretary of the third defendant, denied having seen exh. P7 and exh. P10 before signing the memorandum of transfer. DW8, the solicitor who acted for the third defendant in the purchase of the said land also denied knowing any controversy in respect of the said land prior to the said transfer. He also have not seen exh. P7 and exh. P10. In any event even if the third defendant have notice of exh. P7 and exh. P10 it will not in my view for that reason alone be sufficient to defeat the third defendant's title under s. 132 of the Land Code.

For all the reasons stated above, I dismiss the plaintiff's action against the first, second and third defendants with costs to be taxed unless otherwise agreed.